

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTOPHER J. WALLEY, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 99-0087-B
)	
PEPPER LITTLE ROBINSON,)	
)	
Defendant)	

RECOMMENDED DECISION

Defendant has filed a Notice of Removal of this action from the Maine Superior Court for Hancock County. The Notice of Removal was filed more than 20 months after commencement of the action, and more than 19 months after Defendant first appeared in the action before the state court. The procedures governing removal provide that a Notice of Removal must be filed within thirty days of Defendant's receipt of a copy of the initial pleading. 28 U.S.C. § 1446(b). This time limit is mandatory, and may not be enlarged by agreement of the parties, or order of the court. *Diaz v. Swiss Chalet*, 525 F. Supp. 247 (D.P.R. 1981). Accordingly, this Notice of Removal is untimely and the matter is properly remanded.

In addition, the Court is satisfied that it has no jurisdiction over this action. It is the party seeking to invoke this Court's jurisdiction who bears the burden of pleading the facts essential to show jurisdiction is proper. *McNutt v. General Motors*

Accept. Corp., 298 U.S. 178, 189 (1936). Where it is the Defendant who seeks removal from the state court, jurisdictional uncertainties are resolved in favor of the plaintiff, whose right to choose a forum remains paramount. *Burns v. Windsor Ins.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (citations omitted).

Removal is permitted only when the claim could have been brought originally in federal court. 28 U.S.C. § 1441(a). Accordingly, we look first to the Plaintiffs' Complaint to determine whether removal jurisdiction exists. Plaintiffs' Complaint alleges breach of contract and unjust enrichment arising from legal and related services provided to Defendant by Plaintiffs. There is no federal claim alleged in the Complaint. 28 U.S.C. § 1331. The total amount claimed in damages is \$16,212.65. There is therefore no basis upon which the Court could find diversity jurisdiction. 28 U.S.C. § 1332 (permitting jurisdiction over suits between citizens of different states only where the amount in controversy exceeds \$75,000).

The remaining question is whether Defendant has proved jurisdiction despite the express provisions of the Complaint. The First Circuit Court of Appeals has not had occasion to decide the burden of proof to be applied to this question, but courts have generally described the burden as heavy, the Eleventh Circuit Court of Appeals, for example, requiring proof to a legal certainty. *Burns*, 31 F.3d at 1095; *Boyer v. Snap-On Tools*, 913 F.2d 108, 111 (3rd Cir. 1990). The issue need not be resolved for

purposes of this case, however. Defendant's Notice of Removal simply ignores the amount in controversy requirement of section 1332, and although she asserts there are federal questions, those federal questions are raised only in her own counterclaim. Because Defendant has not asserted a basis upon which the matter could have been brought in this Court, it is not properly removed pursuant to section 1441.

Conclusion

For the foregoing reasons, I hereby recommend the Court REMAND this action to the Maine Superior Court, Hancock County, from which it was removed.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on April 30, 1999.